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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ALFONSO DURAN, Defendant and Appellant.	B282446 (Los Angeles County Super. Ct. No. PA005661)

APPEAL from an order of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph Alfonso Duran, a state prison inmate, appeals the superior court's denial of his application to designate his felony conviction for grand theft of a firearm a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act. We affirm the order denying redesignation.

PROCEDURAL BACKGROUND

In 1991, Duran was convicted of grand theft of a firearm in Los Angeles County case No. PA005661, based upon his guilty plea.[1] (Pen. Code, § 487.)[2] At the time, section 487 provided that any theft of a firearm was grand theft, without regard to the firearm's value. (Former § 487, subd. (3), Stats. 1989, ch. 930, § 6.) Initially placed on probation, Duran was sentenced to 16 months in prison after he violated probation.

In 2005, in an unrelated San Diego County case, No. SCS181667, a jury found Duran guilty of carjacking, robbery, and unlawfully taking and driving a motor vehicle. Duran's prior grand theft of a firearm conviction served as one of two prior "strikes," and he was sentenced as a third-strike defendant to 25 years to life for the carjacking. (See § 1192.7, subd. (c)(26) ["grand theft involving a firearm" is a serious felony].)

On November 4, 2014, California voters enacted Proposition 47, which went into effect the following day. (*People v. Buycks* (2018) 5 Cal.5th 857, 870–871 (*Buycks*); *People v.*

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1 The facts related to Duran's conviction are not set forth in the record, and are not relevant to the issues presented on appeal.

2 All further undesignated statutory references are to the Penal Code.

Johnson (2016) 1 Cal.App.5th 953, 957.) Proposition 47 amended portions of the Penal and Health and Safety Codes to reclassify as misdemeanors certain drug and theft offenses that previously were felonies or "wobblers,"[3] unless committed by ineligible offenders. (*Buycks*, at pp. 871, 877; *People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Johnson*, at p. 957.) As relevant here, Proposition 47 added section 490.2, which provided that for eligible offenders, notwithstanding section 487, "obtaining any property by theft where the value" of the property does not exceed $950 " 'shall be considered petty theft and shall be punished as a misdemeanor . . . .' " Thus, under section 490.2 as originally enacted, theft of a firearm was a misdemeanor unless the firearm's value exceeded $950. (*People v. Romanowski* (2017) 2 Cal.5th 903, 908; *People v. Perkins* (2016) 244 Cal.App.4th 129, 132–133, 141.)

Proposition 47 also enacted section 1170.18, which created procedures whereby eligible defendants who have suffered felony convictions of one of the enumerated crimes may petition for resentencing, or to have such convictions designated misdemeanors. (*Buycks*, *supra*, 5 Cal.5th at p. 871.) Section 1170.18, subdivisions (f) and (g) provide that persons like Duran, who have completed their felony sentences, may petition to have them designated as misdemeanors. (*Buycks*, at p. 876, fn. 4; *People v. Casillas* (2017) 13 Cal.App.5th 745, 751.)

On November 8, 2016, the voters approved Proposition 63, the "Safety for All Act of 2016," which became effective the

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[3] A "wobbler" is a special class of crime that may be charged, or punished, as either a felony or a misdemeanor. (*Buycks*, *supra*, 5 Cal.5th at p. 871, fn. 1; *People v. Park* (2013) 56 Cal.4th 782, 789.)

following day. (Cal. Const., art. II, former § 10, subd. (a); *People v. Romanowski*, *supra*, 2 Cal.5th at p. 908, fn. 2; *John L. v. Superior Court* (2004) 33 Cal.4th 158, 168.) Proposition 63 amended section 490.2 to provide, "This section shall not apply to theft of a firearm." (Prop. 63, § 11.1; § 490.2, subd. (c).) Thus, after enactment of Proposition 63, and as of November 9, 2016, under section 487, subdivision (c), theft of a firearm is once again grand theft, without regard to the firearm's value.

In an application dated November 8, 2016, but filed in the Los Angeles County Superior Court on February 14, 2017, Duran applied to have his 1991 grand theft conviction reduced to a misdemeanor. He checked a box stating: "The amount in question is not more than $950." The document was not signed under penalty of perjury.

Duran served the document on the People prior to its filing with the court. On February 9, 2017, a deputy district attorney indicated in the "response" section of the document that the district attorney opposed reduction of the conviction on the ground grand theft of a firearm did not qualify for Proposition 47 relief. On February 16, 2017, the trial court denied the petition because "grand theft firearm does not qualify for Prop 47 resentencing."

Duran appeals the trial court's order.[4]

DISCUSSION

In his opening brief, Duran does not appear to dispute that, once Proposition 63 took effect, his offense was no longer eligible

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[4] Duran failed to timely appeal the trial court's order, and filed a request for relief with this court. His application for relief was followed by an amended motion for relief filed by appointed appellate counsel, which this court granted.

for reduction to a misdemeanor. He also does not dispute that his application was not actually filed in the trial court until February 14, 2017. However, he contends that under the "prison-delivery rule," his application must be deemed to have been constructively filed as of November 8, 2016, before Proposition 63 took effect. Therefore, he argues, he was entitled to have his grand theft conviction reduced to a misdemeanor. Implicit in his argument is the assumption that the applicable law was that which was in effect on the date his motion was filed, rather than on the date of the court's ruling.

The People argue that Duran has failed to establish that he met the requirements of the prison-delivery rule; the court properly denied the application because Duran failed to establish the firearm's value was $950 or less; and in any event, Proposition 63's amendment to section 490.2 applies retroactively.

We conclude Duran has failed to establish that the prison-delivery rule applies. Accordingly, even assuming the law should be applied as it stood on November 8, 2016 (the date the document was purportedly mailed) and that Duran sufficiently established the value of the stolen firearm, he has nonetheless failed to show the trial court erred.

1. *The prison-delivery rule*

The "prison-delivery" or "prison-mailbox" rule provides that a self-represented prisoner's notice of appeal in a criminal case is deemed timely filed if, within the relevant period, the prisoner properly submitted the notice to prison authorities for forwarding to the clerk of the superior court, pursuant to the procedures established for prisoner mail. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 110 (*Silverbrand*); *In re Jordan*

(1992) 4 Cal.4th 116, 118.) The prison-delivery rule ensures that an unrepresented defendant, who is confined during the period allowed for the filing of an appeal, " 'is accorded an opportunity to comply with the filing requirements fully comparable to that provided to a defendant who is represented by counsel or who is not confined.' " (*Silverbrand*, at p. 110.)

Silverbrand traced the rule's development, noting that incarcerated persons are unable to personally travel to the courthouse or readily ensure a notice of appeal is filed. (*Silverbrand*, *supra*, 46 Cal.4th at p. 118.) The prison-delivery rule "furthers the efficient use of judicial resources by establishing a 'bright-line' test that permits courts to avoid the substantial, administrative burden that would be imposed were courts required to determine, on a case-by-case basis, whether a prisoner's notice of appeal was delivered to prison authorities 'sufficiently in advance of the filing deadline' to permit the timely filing of the notice in the county clerk's office." (*In re Jordan*, *supra*, 4 Cal.4th at p. 119; *Silverbrand*, at p. 119.) *Silverbrand* extended the prison-delivery rule to civil cases, and observed that it had been applied to other filings by self-represented, incarcerated persons, including petitions for postconviction relief and motions. (*Id.* at pp. 110, 123–124, 129.)

2. *Application of the prison-delivery rule*

Duran points to two documents in support of his contention that the prison-delivery rule applies: (1) a proof of service, stating that he placed the Proposition 47 application in a U.S. mail deposit box at High Desert State Prison, and mailed it to the "District Attorney" located at 210 West Temple Street in Los Angeles, on November 8, 2016; and (2) a "CDC-119 Special Purpose Letters" log, indicating that Duran sent a document from

the prison to the Criminal Justice Center, located at 210 West Temple Street in Los Angeles, on November 10, 2016, and sent another document to the Los Angeles County District Attorney, at the same address, on November 16, 2016.

Duran argues that the proof of service purportedly attached to his Proposition 47 application demonstrates he gave prison authorities the petition on November 8, 2016. Therefore, he posits, his application should be deemed constructively filed on November 8, 2016; Proposition 63 did not take effect until the next day; and therefore the former version of section 490.2 applied and he was entitled to resentencing. The People counter that the prison-delivery rule is inapplicable because (1) the proof of service states Duran placed his document in a mailbox, rather than giving it to prison authorities; (2) he failed to provide a copy of the envelope in which he purportedly mailed the document; (3) the "Special Purpose Letters" log suggests he did not mail anything on November 8; and (4) the proof of service indicates the Proposition 47 application was sent to the District Attorney, not the superior court.

We agree that the prison-delivery rule applies to Proposition 47 petitions filed by incarcerated, self-represented defendants. (See *Silverbrand*, *supra*, 46 Cal.4th at pp. 123–124 [prison-delivery rule has been applied in regard to petitions for postconviction relief, motions, and other filings].)

We are unpersuaded by the People's argument that the rule is inapplicable because Duran placed the document in the mail, rather than handed it to prison staff; the existence of the mail log suggests placing the document in the mail was the proper procedure. We are also not convinced that the absence of an

outgoing envelope is significant, as it is not entirely clear how Duran could be expected to retrieve such a postmarked envelope.

On the other hand, we do not believe that the documents Duran presents demonstrate that the prison-delivery rule applies. The proof of service states the Proposition 47 petition was sent to the District Attorney, not the court clerk. To avail himself of the rule, Duran must show he sent the document *to the court*. (See *Silverbrand*, *supra*, 46 Cal.4th at pp. 110–111 ["a notice of appeal by an incarcerated self-represented litigant in a civil case should be deemed filed as of the date the prisoner properly submitted the notice to prison authorities *for forwarding to the clerk of the superior court*," italics added]; *Houston v. Lack* (1988) 487 U.S. 266, 270–271 [notice of appeal timely when delivered to prison authorities "*for forwarding to the District Court*," italics added]; *Hernandez v. Spearman* (9th Cir. 2014) 764 F.3d 1071, 1074 [for a prisoner to "benefit from the mailbox rule . . . the petition must be delivered to prison authorities for mailing to the court within the limitations period"].) Certainly, delivering to prison authorities a document meant for filing with the court, but addressed to some other entity or person, does not fall within the rule. The prison-delivery rule "simply provides that the time of the filing constructively occurs, as a matter of law, when the self-represented prisoner properly delivers the notice to the prison authorities *for forwarding to the superior court clerk*." (*Silverbrand*, at pp. 120–121, italics added.) Thus, the proof of service does not show Duran gave the document to prison officials for filing *with the court* on November 8.

Nor does the Special Purpose Letters log suffice to bring the issue within the purview of the prison-delivery rule. The log indicates that Duran sent a document from the prison to the

Criminal Justice Center, located at 210 West Temple Street in Los Angeles, on November 10, 2016. While both the Los Angeles County criminal court and the district attorney's office are located at that address, viewing the log in conjunction with the proof of service, it appears this entry refers to the application that, according to the proof of service, Duran sent to the district attorney. The second entry, showing a document sent to the district attorney on November 16, 2016, does not assist Duran in establishing he placed a document in the mail to the court on November 8. Given that the log shows mail went out from the prison on November 10, if Duran had placed a document in the mail addressed to the court on November 8, it would have gone out at least with the November 10, 2016 mail. The fact he sent a different document to the district attorney's office on the 16th does not show he placed his application, addressed to the court, in the prison mail on the 8th.[5]

For the first time in his reply brief, Duran states that his case is "compelling" because he attempted, in 2015, to have his grand theft firearm conviction reduced to a misdemeanor in the

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[5] Duran also filed, in support of his motion for relief from failure to file a timely notice of appeal, a declaration signed under penalty of perjury, stating that "On November 8, 2016, I filed my petition for reli[e]f under Prop. 47 to the L.A. Superior Court in case no. PA005661-01." Duran does not argue that this document supports application of the prison-delivery rule. A declaration can be sufficient to trigger the prison-delivery rule, if it provides the requisite information. (See generally *Silverbrand*, *supra*, 46 Cal.4th at p. 112.) But, here the application was not actually filed with the court until February 14, 2017. Duran's conclusory declaration fails to provide any information from which we could conclude the prison-delivery rule applied.

incorrect court. He argues that he mistakenly filed a Proposition 47 petition in San Diego County Superior Court, seeking to have his grand theft firearm conviction—which was suffered in Los Angeles County—reduced to a misdemeanor, and then attempted to appeal the adverse ruling on that application, including via a petition for a writ of habeas corpus. Citing *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, Duran argues that the "relation back doctrine would cause the 2015 date of appellant's initial Proposition 47 filing to be controlling."[6]

Duran's contentions fail for several reasons. " '[O]rdinarily, we do not consider arguments raised for the first time in a reply brief,' " (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 768) and Duran has provided no reason for us to depart from this practice. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26; *People v. Clayburg* (2012) 211 Cal.App.4th 86, 93.)

Second, Duran's "relation-back" argument is perfunctory, consisting of a single conclusory sentence and citation. (See *People v. Aguayo*, *supra*, 31 Cal.App.5th at p. 768 [failure to develop an argument results in forfeiture of the argument on appeal]; *People v. Clayburg*, *supra*, 211 Cal.App.4th at p. 93 [points perfunctorily asserted without argument in support are

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[6] As Duran requests, we take judicial notice of various documents related to the San Diego proceedings. (Evid. Code, §§ 452, subd. (d), 459.) Although Duran's filing of an application in the San Diego Superior Court has no bearing on the trial court's denial of his subsequent Los Angeles application, the documents he presents are otherwise relevant to this matter's procedural history.

not properly raised]; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4; *People v. Gray* (1998) 66 Cal.App.4th 973, 994.)

Third, Duran fails to persuasively explain how the "relation-back" doctrine would assist him here. The "relation-back doctrine" is used, primarily in civil cases, to determine the time of commencement of an action for statute of limitations purposes. (*Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146, 150.) Under that doctrine, an amended complaint is deemed to have been filed at the time of an earlier complaint if it rests on the same general set of facts, involves the same injury, and refers to the same instrumentality as did the original complaint. (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 841; *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at pp. 408–409; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278.) Duran fails to explain how this doctrine applies in the instant matter, where the document at issue is a Proposition 47 application, not a complaint.

For the foregoing reasons, the superior court did not err by denying Duran's application. In light of our conclusion, we need not reach the People's arguments that Proposition 63 was retroactive, or that Duran failed to establish the firearm he stole in 1991 was valued at $950 or less.[7]

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[7] We requested that the parties provide supplemental briefing on whether the date of the application's filing, rather than the date of the trial court's ruling, was controlling on the question of which version of section 490.2 applied. In light of our conclusion that Duran has failed to establish applicability of the prison-delivery rule, we need not further address this issue.

DISPOSITION

The trial court's order is affirmed. Duran's request for judicial notice is granted.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.